149 U.S. 227

RECORD, CASE No. 15,282.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1312.

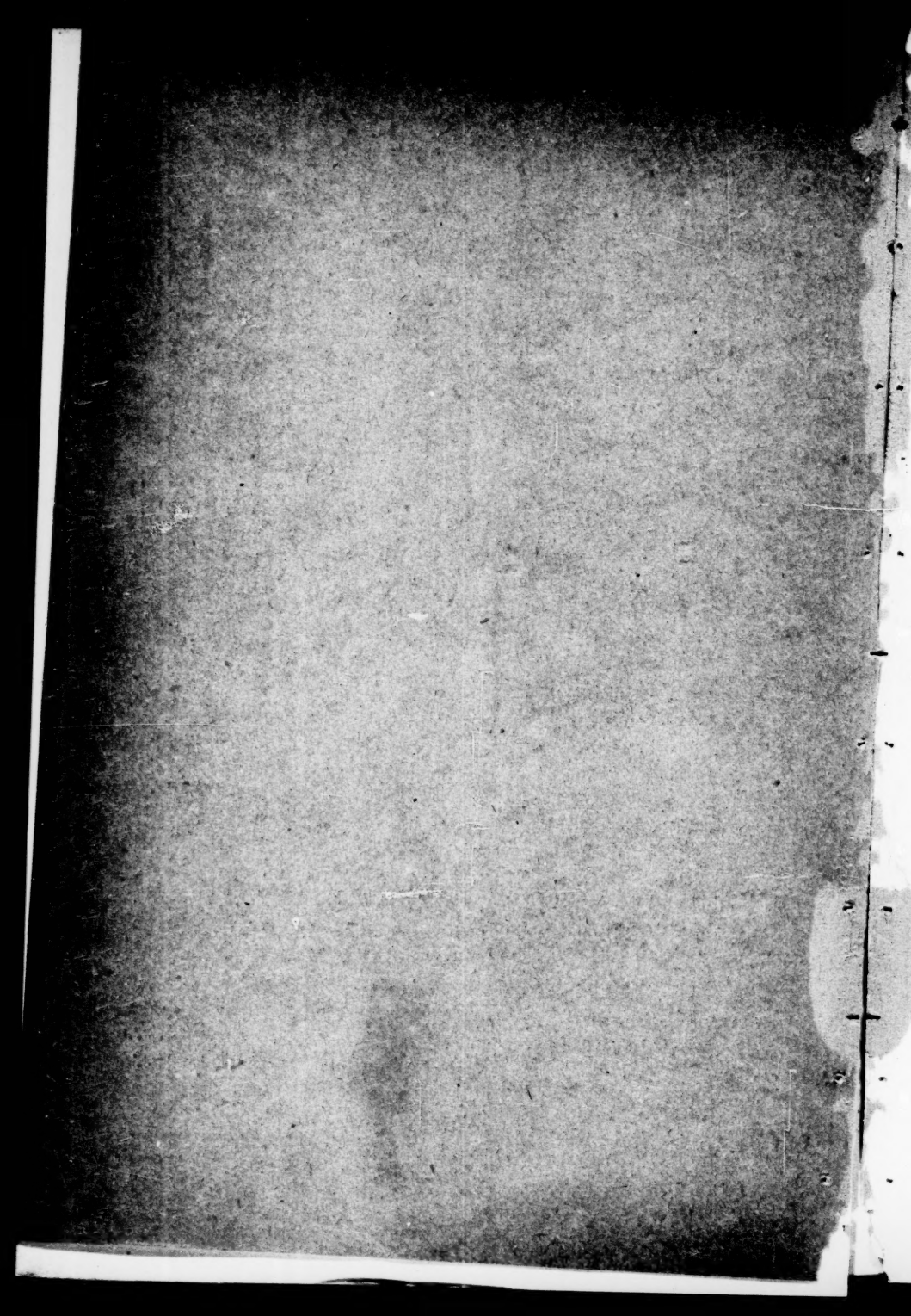
THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

IDA MAY ANDERSON AND HUSBAND, SCOTT ANDERSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MARCH 24, 1893.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 25, 1893.

1 UNITED STATES OF AMERICA, *Fifth Judicial Circuit.*

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, in the court-room of said court, in the city of New Orleans, on the third Monday of November, A. D. 1892.

Present and presiding, the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit.

Present also the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

Be it remembered that on the 13th day of March, A. D. 1893, the same being a day of said November term, 1892, the following proceedings were had, to wit:

2 TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
IDA MAY ANDERSON and Husband, SCOTT ANDERSON, Defendants in Error. } No. 105.

This cause came on to be heard upon the motion of the defendants in error to dismiss the writ of error for want of jurisdiction and upon the merits, and was argued upon the following state of facts apparent of record in this cause and of the original cause of Ida May Cox, of the docket of the circuit court for the eastern district of Texas, all substantially agreed to, to wit:

On the 3d day of September, 1887, Mrs. Ida May Cox instituted suit against John C. Brown and Lionel A. Sheldon, as receivers of the Texas and Pacific railway, to recover damages for the death of her husband, Charles Cox, resulting from their negligence while operating that company's road. On the 13th day of September, 1888, judgment was rendered in the circuit court of the United States for the eastern district of Texas, at Jefferson, against John C. Brown and Lionel A. Sheldon, as such receivers, for the sum of $15,000.00, $5,000.00 of which was afterwards remitted by the plaintiff, and judgment was entered for $10,000 00, with interest from date at 8 %. After said judgment was obtained, Sheldon having resigned as receiver and his resignation having been accepted by the court, John C. Brown, as sole receiver, prosecuted a writ of error from said judgment to the Supreme Court of the United States and gave

3 supersedeas bond. While the writ of error was pending on, to wit, May 16th, 1888, the receiver made known to the United States circuit court for the eastern district of Louisiana, the court that had appointed him, that the objects and purposes contemplated in the several proceedings under which he had been appointed had been practically accomplished—that the parties in interest so

agreed—and at the settlement with him and the payment of costs and other liabilities, or provision therefor made, that he should be discharged and the cause dismissed.

The agreements of the several parties to this effect were made exhibits to the receiver's petition for discharge. His petition further stated that his accounts to the first of May were in a condition for settlement, which he asked to be allowed to make. His petition further stated that he had an agreement with the reorganization committee as to his compensation, and prayed that he be allowed to turn over to the proper officers of the railway company the property in his hands, but he made known to the court in his said petition that there were unsettled claims growing out of his conduct of the business of said railway company as receiver thereof, against which he asked protection. On the same day the petition was acted upon by the court, which, after directing a settlement to June 1st, stated that "in the meantime the receiver will continue to hold the property under orders of the court until the 1st of June, 1888, at which time, if this order is not vacated, the railway and its property may be operated by the corporation under such orders as may be made by the court from time to time, and under the super-
4 vision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court nor of the receiver until the accounting takes place with the receiver, and until he is fully protected by the corporation for causes of action originating against him and against the property pending the receivership.

On or before October the 26th, 1888, the receiver, reciting the former orders and stating that his accounts had been examined and approved, stated that no formal delivery of the road and property in his hands had been made to said railway company. He then asked that he be allowed to formally deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the 1st of June and for all receipts and expenditures by him received and made since the 1st of June. He stated in said petition that he had carried over to the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the 1st of June as aforesaid; that he was then president of said railway company and after his discharge would be in possession of all said company's road, property, and funds as such president for said company. He asked the court to discharge him from his said receivership and that his bond be vacated and annulled on payment of all costs legally taxable. He asked the court to make such orders as would charge the property so turned over in his hands of said railway company and its assigns with all liabilities for which he as receiver was or might be held personally liable.

5 The petition further stated that his compensation as receiver had been agreed upon and settled to the 31st of October, at which time he asked that his discharge take effect.

The petition was acted upon by the said court on October the 26th, 1888, and the following order was entered:

"On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas and Pacific railway in the above-entitled causes, be, and he is hereby, directed to make delivery unto said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1st, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888. Such delivery will be made as of October 31st, 1888.

It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

It is further ordered that said property nevertheless shall be delivered to and received by said Texas and Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determinations on interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the same extent they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property.

The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver, as such, up to said thirty-first October, 1888, be presented and prosecuted by intervention prior to February first, 1889, and if not so presented by that date that the same be barred and shall not be a charge on the property of said company.

6 It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge and a notice to said claimants to make claim within the time aforesaid, to wit, before the first of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway."

In November, 1889, while the writ of error was pending, with the

consent of both parties, an order was made by the Supreme Court of the United States substituting the Texas and Pacific Railway Company as plaintiff in error in lieu of Brown, receiver. This was done upon the following stipulation: "That the said Texas and Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause now pending and undetermined upon writ of error in this court, such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court the same as if said substitution had not been made."

The judgment rendered in the circuit court of the United States for the eastern district of Texas in the case of Ida May Cox *vs.* John C. Brown and Lionel A. Sheldon, as receivers, provided that the same was to be paid in due course of the administration of said receivership, and it further ordered that a certified copy of the order or decree be forwarded by the clerk to the clerk of the United States circuit court of the eastern district of Louisiana, to be filed by him in the papers of said receivership and called to the attention of the court. On May 16, 1892, the Supreme Court of the United States affirmed the judgment of the lower court (said case is re-
7 ported in 145 U. S. Rep., 601), and caused its mandate to be issued, which mandate, after reciting the facts substantially detailed above, proceeded as follows:

"On consideration whereof it is now here ordered and adjudged by this court that the judgment of circuit court in this cause be, and the same is hereby, affirmed, with costs and interest until paid at the rate per annum that similar judgments bear in the courts of the State of Texas, and that the said plaintiff recover against the said Texas and Pacific Railway Company for her costs herein expended and have execution therefor."

The mandate then concluded in the usual form, as follows:

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

Pending the writ of error in the United States Supreme Court the defendant in error, Ida May Cox, married one Scott Anderson. Upon reception of the mandate execution was issued by the clerk of the circuit court of the United States for the eastern district of Texas against the Texas and Pacific Railway Company for the full amount of judgment, with 8 per cent. interest and costs. Said Texas and Pacific Railway Company thereupon filed its bill against the United States marshal in whose hands the execution had been placed for levy, asking that he be restrained from levying the same upon the ground that there was no judgment to support said execution. A restraining order was granted by Judge A. P. McCormick restraining him from levying said execution and citing him to show cause on a certain day and date why said injunction should not be granted. The restraining order was continued in force until the 22d day of

November, 1892, when said injunction or restraining order
8 was dissolved by the Hon. David E. Bryant, United States district judge for the eastern district of Texas. On November 22, 1892, the defendant in error, Ida May Anderson, joined by her husband, Scott Anderson, filed their motion in the cause of Ida May Cox *vs.* John C. Brown and Lionell A. Seldon; which said motion, after reciting substantially the facts before detailed, prayed as follows:

"The said Ida May Anderson, joined by her said husband, Scott Anderson, prays inspection of said mandate and the certified copy of the proceedings of the Supreme Court of the United States, whereby the said Texas and Pacific Railway Company was made a party plaintiff in error; that your honor will direct the clerk of the said United States court for the eastern district of Texas to issue an execution on said judgment in favor of plaintiff, Ida May Anderson, for the full amount of said judgment and 8 per cent. interest per annum thereon from its date and all costs of suit."

The Texas and Pacific Railway Company resisted the motion of the defendant in error for execution against it, but its objections were overruled, and the court entered an order directing the clerk to record the mandate of the Supreme Court of the United States in said cause and to issue an execution on the original judgment of the United States circuit court for the eastern district of Texas against the Texas and Pacific Railway Company for the sum of $10,000.00, with interest at the rate of 8 per cent. per annum from the 15th day of September, A. D. 1888, and for all costs incurred in said cause; to which action of the court the Texas and Pacific Railway Company excepted, and, the court below having signed and approved its bill of exceptions, an application for writ of error and supersedeas was made to the Hon. A. P. McCormick, who granted same, and the suit was brought to this court, the plaintiff in error filing the following assignments of error:

9 "The court erred in making an order awarding execution against the Texas and Pacific Railway Company, because the original judgment was against John C. Brown, as receiver of the Texas and Pacific railway, and directing that a copy of the judgment should be filed in the circuit court of the United States at New Orleans in the cause wherein the receiver was appointed, and the Texas and Pacific Railway Company was made plaintiff in error in United States Supreme Court without prejudice to any of the questions presented by the record, and the facts presented in the motion for execution did not show any liability on the part of the Texas and Pacific Railway Company such as would justify the court in awarding execution against said company.

The court erred in ordering execution to issue against the Texas and Pacific Railway Company for the $10,000.00, the amount of the original judgment, and 8 per cent. interest thereon from the date of the judgment, to wit, September 15, 1888, because by the law of Texas a judgment bears only 6 per cent. interest, and the judgment of the United States Supreme Court in this cause adjudged that the judgment should bear interest at the rate per annum that similar

judgments bear in the courts of the State of Texas. Wherefore said judgment should only bear 6 per cent."

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the Supreme Court of the United States in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals and define and regulate in certain cases the jurisdiction of the circuit courts of the United States, and for other purposes," approved March 3, 1891, to wit:

First. Does the act of March 3, 1891, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," give to said circuit courts of appeals jurisdiction by appeal or writ of error or otherwise to review the decrees,
10 orders, or judgments made by district courts or existing circuit courts construing a mandate from the Supreme Court of the United States and in executing the same?

Second. Was it the intention of the Supreme Court of the United States in affirming the judgment in the case of John C. Brown, plaintiff in error, *v.* Ida May Cox, defendant in error, that said judgment should be subject to the general equitable jurisdiction of the court in which such receiver was appointed and be paid in due course of the administration of said receivership, or did it intend that execution should issue directly against the Texas and Pacific Railway Company for the amount of said judgment?

Third. At the date said judgment was originally recovered, to wit, September 15, 1888, it bore interest under the law of the State of Texas at the rate of 8 per cent. per annum. Subsequently, to wit, on April 13, 1891, the statute of the State of Texas fixing the rate of interest that judgments of this kind should bear was amended, so that instead of bearing eight per cent. interest judgments thereafter obtained were made to bear only six per cent. interest per annum. Should the judgment in this case bear interest at the rate of eight per cent. per annum or at the rate of six per cent. per annum?

Certified copies of the printed record and briefs on file will be transmitted with this certificate to the Supreme Court.

11 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing ten pages, numbered from one to ten, inclusive, contain a true copy of the proceedings had on the 13th day of March, A. D. 1893, in the case of The Texas and Pacific Railway Company, plaintiff in error, *vs.* Ida May Anderson and husband, Scott Anderson, No. 105, November term, 1892, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 16 day of March, A. D. 189–.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 15,282. U. S. circuit court of appeals, 5th circuit. Term No., 1312. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Ida May Anderson and husband, Scott Anderson. Filed March 24th, 1893.

149 U.S. 237

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 1312.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

IDA MAY ANDERSON, and husband SCOTT ANDERSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
HARRY HUBBARD,
For Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.

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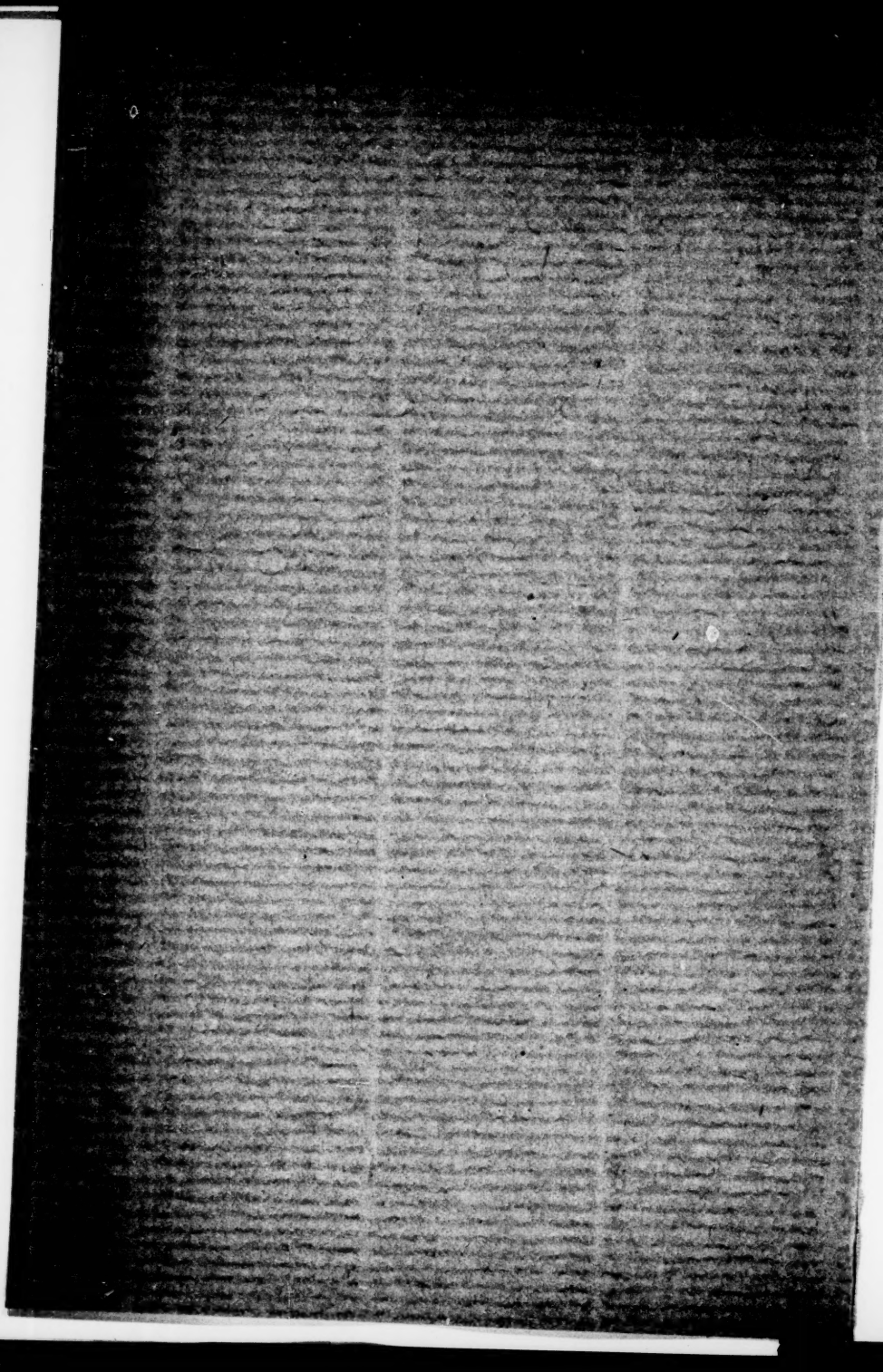

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 1312.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

IDA MAY ANDERSON and Husband,
SCOTT ANDERSON.

Brief for Plaintiff in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Statement of the Case.

The judgment of the Circuit Court, which was rendered when the case was tried, and which was, on writ of error, affirmed by this Court (145 U. S., 593), was as follows (Record of that case in this Court, p. 28; present Record, p. 1):

"Therefore, it is considered by the Court, ordered and adjudged that the plaintiff Mrs. Ida May Cox do have and recover of and from the defendant John C. Brown and Lionel A. Sheldon, as Receivers of the Texas and Pacific Railway Company, the sum of fifteen thousand dollars (afterwards remitted to ten

thousand), with interest thereon at the rate of eight per cent. per annum from this day, and all cost in this behalf expended, to be paid in due course of the administration of their receivership.

"Further ordered that the officers of this Court do have and recover from the parties herein their cost by them respectively incurred.

"And it is ordered that a certified copy of this decree be forwarded by the Clerk of this Court to the Clerk of United States Circuit of the Eastern District of Louisiana, to be filed by him in the papers of said receivership and called to the attention of the Court."

This Court affirmed that judgment, and issued its mandate as follows (Record, this case, p. 4):

"On consideration whereof it is now here ordered and adjudged by this Court that the judgment of Circuit Court in this cause be, and the same is hereby, affirmed with costs and interest until paid at the same rate per annum that similar judgments bear in the courts of the State of Texas, and that the said plaintiff recover against the said Texas and Pacific Railway Company for her costs herein expended and have execution therefor."

The mandate then concluded in the usual form as follows:

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding," etc.

Upon reception of the mandate execution was issued by the Clerk of the Circuit Court of the United States for the Eastern District of Texas *against the Texas and Pacific Railway Company* for the full amount of the judgment, with 8% interest and costs. Whereupon, that company applied for an injunction against the Marshal in whose hands the execution had been placed, restraining him from levying the same, *upon the ground*

that there was no judgment to support the execution. Later this injunction was dissolved by the District Judge; and, on motion of plaintiff's attorney, the Court made an *order directing the Clerk to record the mandate of the Supreme Court, and to issue an execution on the original judgment* of the United States Circuit Court for the Eastern District of Texas *against the Texas and Pacific Railway Company,* with interest at 8%, and for all costs incurred in said cause. Whereupon, to reverse such order, the Texas and Pacific Railway Company brought its writ of error to the Circuit Court of Appeals, and that Court has certified to this Court certain facts and propounded certain questions of law as stated in the transcript, which questions we now proceed to consider.

I.

The Circuit Court of Appeals has jurisdiction on this writ of error.

Section 5 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (26 Stat., 826) provides in what cases appeals or writs of error shall be allowed direct to the Supreme Court. But that section does not provide for such a case as the present one.

Section 6 of that Act, however, provides:

"That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts *in all cases other than those provided for in the preceding section* of this act, unless otherwise provided by law," &c.

This act, Section 6, clearly gives the Circuit Court of Appeals jurisdiction in the present case. In at least two instances, in similar cases, the Circuit Courts of Appeals have so held, and have entertained jurisdiction. In each of these two cases the opinion was rendered by a present member of this Court who was then sitting in the Circuit Court of Appeals.

In *Day vs. Sickles*, 6 U. S. App., 22, the case was as follows: The Circuit Court for the Southern Division of the Western District of Michigan entered a decree in a foreclosure proceeding ordering distribution and payment of a certain sum of money by Day. From this order Day appealed to the Supreme Court of the United States. In 1890 the Supreme .Court affirmed the decree of the Circuit Court and the cause was remanded to the Circuit Court under the usual mandate, which, as usual in conclusion, " commanded that such executions and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had," &c. Day paid over the amount so decreed against him, but declined to pay interest on the same, on the ground that neither the decree nor mandate gave interest. Other parties who were interested in the decree presented a petition to the Circuit Court to require Day to pay interest, and the Circuit Court granted the petition and made an order directing the payment of interest. From that order directing him to pay interest Day appealed to the Circuit Court of Appeals, and that Court (Judge JACKSON giving the opinion) held that the Circuit Court erred in making the order granting interest, when neither the original decree of the Circuit Court nor the mandate of the Supreme Court required the payment

of interest, and reversed the decree of the Circuit Court.

Another case in point is *Nashua and Lowell R. R. Co. vs. Boston and Lowell R. R. Co.*, 5 U. S. App., 97. At the hearing of the original case the Circuit Court entered a final decree dismissing the bill. Plaintiff appealed to the Supreme Court of the United States, and this Court reversed the decree of the Circuit Court and sent down its mandate accordingly for further proceedings. The Circuit Court rendered a decree in favor of the plaintiff, from which decree the plaintiff appealed to the Circuit Court of Appeals. The defendant moved to dismiss the appeal upon the ground, among others, "Second: That the decree appealed from was made in obedience to and performance of the mandate of the Supreme Court." But the Circuit Court of Appeals held that it had jurisdiction, and declined to dismiss the appeal. Mr. Justice GRAY, delivering the opinion, said (p. 100):

> "The decree now in question having been rendered since July 1, 1891, when the Act of March 3, 1891 (Sec. 517), took full effect, and not coming within the special provisions of Section 5 of that act, but falling under the general provisions of Section 6, the present appeal is rightly taken to this Court."

For the reasons above stated, the Circuit Court of Appeals was the proper *court* to which to bring a writ of error in the present case. We proceed to show that a writ of error is a proper *remedy*.

When a Circuit Court commits an error in construing a Mandate, a Writ of Error or Appeal, as the case may be, is a proper remedy.

This proposition became settled law at an early date. In the famous case of *Martin vs. Hunter's Lessee*, 1 Wheat., 304 (1816), the question was raised and decided. STORY, J., giving the opinion, says (p. 354):

> "In causes remanded to the Circuit Courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be the proper remedy, and has been recognized as such in the former decisions of this Court."

In the case of *Perkins vs. Fourniquet*, 14 Howard, 328, the decree of the Circuit Court was affirmed by this Court, with costs and damages at the rate of 6 per cent., and mandate issued to the Circuit Court, reciting the judgment of this Court and directing it to be carried into execution. After the mandate was filed in the Circuit Court the appellees obtained an execution against the appellant, by which the marshal was commanded to levy the amount of the original judgment of the Circuit Court, with the Mississippi interest at 8 per cent., and damages at the rate of 6 per cent., in addition, making together 14 per cent. The defendant paid the damages at the rate of 6 per cent., and moved the Court to order satisfaction of the decree upon the record. The Court overruled the motion, but at the same time ordered that no further execution issue until the appellant had a reasonable time to present an appeal to this Court; and this appeal was taken. This Court, TANEY, C. J., giving the opinion, said (p. 330):

"A motion has been made to dismiss upon the ground that the appeal will not lie from this decision of the Circuit Court. * * *

"This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this Court left nothing to the judgment and discretion of the Circuit Court, but directed it to carry into execution the decree of this Court, which was recited in the mandate. And if the decree of this Court has been misunderstood, or misconstrued, by the Court below, to the injury of either party, we see no valid objection to an appeal to this Court, in order to have the error corrected. * * * This decision, although briefly stated, was, in substance, a final decree upon the matters in controversy. It might, therefore, under the act of Congress, be regarded as such, and be revised accordingly, by an appeal to this Court."

In *Cook vs. Burnley*, 11 Wall., 672, CLIFFORD, J., giving the opinion of the Court, says (p. 674):

"Where the subordinate Court commits any substantial error in executing the mandate of the Supreme Court, it is *well-settled law* that a second writ of error, or appeal, as the case may be, will lie to correct the error and to cause the mandate to be executed according to its tenor and effect."

See also, to the same effect, *Roberts vs. Cooper*, 20 How., 467.

Stewart vs. Salamon, 97 U. S., 361, 362.

A writ of error, therefore, is the proper *remedy* in the present case, where the Circuit Court made a mistake in construing the mandate of the Supreme Court; and, as we have already shown, *supra*, the Circuit Court of Appeals is, under the Act of March 3, 1891, the proper *tribunal* before which to bring such writ of error.

II.

The decision and mandate of this Court in affirming the judgment in the case affirmed such judgment as it was rendered in the Circuit Court, viz., as a judgment against the Receivers, "to be paid in due course of the administration of their receivership," and not a judgment against the Texas and Pacific Railway Company personally. As there was and is no judgment against the Texas and Pacific Railway Company, the Circuit Court erred in awarding execution against the Railway Company.

The judgment of the Circuit Court, which judgment was affirmed *without change or modification* by the Supreme Court of the United States, and which stands as the only judgment in the case, was :

"That the plaintiff Mrs. Ida May Cox *do have and recover of and from the defendants John C. Brown and Lionel A. Sheldon, as Receivers* of The Texas and Pacific Railway Company, the sum of $15,000 [afterwards remitted to $10,000, Record, p. 1], with interest thereon at the rate of eight per cent. per annum from this day, and all costs in this behalf expended, *to be paid in due course of the administration of their receivership.* * * * And it is ordered that a certified copy of this decree be forwarded by the Clerk of this Court to the Clerk of the United States Circuit of the Eastern District of Louisiana, to be filed by him in the papers of said receivership and called to the attention of the Court."

This judgment, we repeat, was the only judgment rendered in this case. It was the judgment which was affirmed by this Court, and was affirmed without change

or modification. The mandate of this Court provided (Record, p. 4):

"That *the judgment of the Circuit Court* in this cause be, and the same *is hereby, affirmed*, with costs and interest until paid at the same rate per annum that similar judgments bear in the Courts of the State of Texas, and that the said plaintiff *recover against the said Texas and Pacific Railway Company for her costs herein* expended and have execution therefor."

This mandate, *ex vi termini*, affirms the judgment of the Circuit Court precisely as it was rendered. It is the same as if this Court had, in its mandate, set out at length the judgment of the Circuit Court, and had said: "This judgment we affirm exactly as it stands." "*The judgment of the Circuit Court*" was a judgment against *the Receivers*, "to be paid in the due course of administration of their receivership." "The judgment of the Circuit Court" was not changed or modified in any respect. No judgment was to be entered against the Texas and Pacific Railway Company, except for the *costs of the writ of error in the Supreme Court of the United States;* and the reason of this was that the Texas and Pacific Railway Company was not a party to any proceeding, *except as plaintiff in error in the Supreme Court, for the sole purpose of prosecuting the writ of error.* It voluntarily became plaintiff in error in order to protect its interest in the property which might be affected by the judgment rendered by the Circuit Court. It was not a party to the cause below. No judgment was rendered against it in the Court below, and "the judgment of the Circuit Court," which this Court affirmed, was a judgment against the Receiver and not against the Texas and Pacific Company. That this is clear is obvious from the express provision of the mandate "that the plaintiff recover against the said Texas and

Pacific Railway Company for her costs *herein* expended and have execution therefor." This is the only judgment against the Texas and Pacific Company ; namely, a judgment for *costs in the Supreme Court* on the writ of error. All other things were provided for in the previous sentence of the mandate of this Court, to wit, " that the judgment of the Circuit Court " (which was a judgment against the Receivers), " be, and the same is hereby, affirmed with *costs* and interest until paid " (that is, costs in the Circuit Court). This clearly appears further from the language of the mandate of this Court, which can bear no other construction than that which we here state. The mandate of this Court contains two distinct and independent provisions, to wit :

" It is now here ordered and adjudged by this court :
" (1) that the judgment of Circuit Court in this cause be, and the same is hereby, affirmed, with costs and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas,"

[Note that this sentence is complete and ends here. Then begins a new sentence : " It is now here ordered and adjudged by this Court (1) that * * *] "

" (2) And that the said plaintiff recover against the said Texas and Pacific Railway Company for her *costs herein* expended and have execution therefor."

These are two distinct and independent provisions of the mandate of this Court : (1) affirms the judgment against the *Receivers* with *costs of the Circuit Court* and interest ; and (2) grants a judgment for *costs in the Supreme Court* against the *Texas and Pacific Railway Company.*

On the record in the court below no judgment could have been entered against the Railway Company. It was not a party to the case; it had not been brought into court; it did not plead or have an opportunity to plead. A judgment against the Railway Company in a suit to which it was not a party is a thing unknown to the law. When the case came to this court on writ of error, this court had no power or authority to direct the trial court to enter judgment against the Railway Company. This court could not have made the Railway Company a party to the suit in the Circuit Court; at least, not without the consent of the Railway Company. And such consent was never given (see Stipulation, *infra*). This case came to this Court by virtue of its appellate jurisdiction, and not by virtue of its original jurisdiction. On writ of error this Court has no power to make new parties in the trial court. The only way of making new parties in the trial court is by the ordinary method of summons or subpœna, giving such new parties an opportunity to plead and be heard in the trial court. After pleadings have been had, case tried and judgment rendered, it would, indeed, be an anomaly for this Court, or any other Court exercising only appellate jurisdiction, to direct the lower Court to enter judgment against a person or corporation not a party to the record in the trial court. This Court, in its decision and mandate in this case, did not commit any such judicial solecism.

The form of the second question certified by the Circuit Court of Appeals was as follows (Record, p. 6):

"Was it the *intention* of the Supreme Court of the United States in affirming the judgment * * * that said judgment should be * * * paid in due course of the administration of the receivership,

or did it intend that execution should issue directly against the Texas and Pacific Railway Company for the amount of said judgment?"

While there can be no doubt as to what was the "intention" of this Court, yet the question is strictly not a question of the *intention* of this Court, but of the *legal effect* of the decision and mandate of this Court. The matter has now passed into judgment. The decision was rendered at the October Term, 1891, of this Court, which term has ended, and this Court has no longer any power to change its decision and mandate, but can only construe it according to its legal effect. We say the intention of this Court was clear that the judgment of the Circuit Court was against the Receivers, to be paid in due course of the administration of their receivership, and was not a judgment against the Texas and Pacific Railway Company, and that this Court affirmed such judgment with full knowledge of its terms and effect. It is only necessary to refer to the opinion of this Court to show that such is the fact. The Court says, 145 U. S., 601, quoting from *McNulta vs. Lochridge*, 141 U. S., 327, 332:

"Actions against the Receivers are in law actions against the receivership or the funds in the hands of the Receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and *a judgment against him as Receiver is payable only from the funds in his hands.*"

Note that the railway company was not a party to this cause in the Circuit Court, but that the company was by its stipulation substituted only as plaintiff in error in the Supreme Court. The Texas and Pacific Railway Company was merely made *plaintiff in error in this Court.* This was for the purpose of prosecuting

the writ in this Court, and for no other purpose. The stipulation under which this was done expressly so provided (Record, p. 4) :

" That the said Texas and Pacific Railway Company may be substituted *as plaintiff in error* in the above-entitled cause now pending and undetermined upon writ of error in this Court, *such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this Court the same as if said substitution had not been made.*"

No judgment was rendered against the Texas and Pacific Railway Company in the Circuit Court, nor could there have been, since it was not a party before the Court. On no theory, therefore, could the judgment of the Circuit Court have been rendered against the railway company, and on no theory could this Court have affirmed or intended to affirm any judgment against the railway company.

Furthermore, when this cause was before this Court, the learned counsel for Mrs. Cox, the defendant in error, expressly recognized the fact in his written brief that the judgment in this case was against the Receivers, and payable only in the course of administration of the receivership, and that the judgment was properly rendered as it was. In his brief at page 3 he says :

" The jurisdiction was simply exercised to establish by judgment the existence and extent of the claim. *The manner in which the judgment was to be satisfied was properly left to be determined by the Court appointing the Receivers*, as that Court must have control of all moneys coming into the hands of the Receivers and the right to administer the same."

In other words, the learned counsel here states in substance that this judgment against the Receivers was

in effect a liquidation of the claim, and that, when liquidated, the claim could be paid only in the course of the administration of the receivership.

There was no claim put forward by plaintiff in this case from first to last, either in the Circuit Court or in this Court, that she had any right or claim to a personal judgment against the railway company, or that any such judgment was rendered. The printed briefs on both sides will, if examined, verify this statement.

Therefore, as we have above stated, the judgment of the Circuit Court was a judgment against the Receivers only, and was to be paid by them in the due course of the administration of their receivership, and was not a judgment against the railway company; and, for this reason, the Circuit Court erred in awarding execution against the railway company.

The Circuit Court cannot modify or change a judgment that has been affirmed by this Court. On a mandate from this Court, the Circuit Court can only record the mandate and proceed with the execution of its own decree, as affirmed.

This proposition is familiar law.

Skillern's Executors vs. May's Executors, 6 Cranch, 267.
Ex parte Story, 12 Pet., 339.
Chaires vs. United States, 3 How., 611.
Durant vs. Essex Co., 101 U. S., 555.
Re Washington and Georgetown Railroad Co., 140 U. S., 92, 94 and 95–97.

This Court has no power to alter its mandate after the term at which it was sent down.

This proposition also is so well settled, and so obviously correct, that we simply quote a few brief extracts from the decisions of this Court, which show that this is the established rule of law. In the case of *Martin vs. Hunter's Lessee*, 1 Wheat., 304, on a second writ of error, referred to *supra*, Mr. Justice STORY, giving the opinion of the Court, says (p. 355):

"In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this Court can revise its own judgments. In several cases which have been formerly adjudged in this Court the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this Court was conclusive upon the parties, and could not be re-examined."

See also the case of *Roberts vs. Cooper*, 20 How., 467. On a second writ of error, Mr. Justice GRIER, delivering the opinion of the Court says (p. 481):

"But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this Court that after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same

questions which were open to dispute on the first would lead to endless litigation."

Again, in *Stewart vs. Salamon*, 97 U. S., 361, on a second appeal, Chief-Justice WAITE, delivering the opinion, says (p. 362):

"The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate."

This doctrine was emphatically affirmed in the recent case *Re Washington and Georgetown R. R. Co.*, 140 U. S., 91. In that case the question of the proper execution of the mandate of this Court was brought before this Court by a writ of mandamus. The question raised was a question whether the original judgment of the Court of the District of Columbia, as affirmed by this Court, bore interest. *This Court expressly declined to consider the question whether or not it would have been proper for the trial Court in rendering the judgment to have allowed interest upon it.* Mr. Justice BLATCHFORD, delivering the opinion of the Court, says (p. 97):

"We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the Special Term, or whether it would have been proper for the Special Term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the General Term to do so; but we render our decision solely upon the point that, as neither the

Special Term nor the General Term allowed interest on the judgment, and as this Court awarded no interest in its judgment of affirmance, all that the General Term could do, after the mandate of this Court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the General Term, and directing execution of the judgment of the Special Term of December 18, 1885, with costs, and without interest, and of the judgment of the General Term of June 28, 1886, for costs."

This decision and language of the Court is especially pertinent in the present case. It is not now a question in this case whether the original judgment of the Circuit Court *could* have been against The Texas and Pacific Railway Company, or whether the judgment of affirmance of this Court *should* have directed judgment and execution against that company (though, obviously, neither of these things could or should have been done), but the question is, what judgment *was* rendered, and whether a judgment which was rendered against Receivers payable in the course of administration of their receivership, and which was affirmed by this Court precisely as it was rendered, can, after the mandate of this Court has gone down, be changed by the Circuit Court and execution be issued thereon against the Texas and Pacific Railway Company. Inasmuch as the judgment of the Circuit Court was against the Receiver, and that judgment was affirmed by this Court precisely as it was originally rendered, and neither that judgment nor the mandate of this Court gave any judgment against the railway company (except for costs in the Supreme Court of the writ of error), therefore, it follows, under the well-settled rules above stated, that there is no judgment against the Texas and Pacific Railway Company (except for costs of writ of error in this Court), and the Circuit

questions which were open to dispute on the first would lead to endless litigation."

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"The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate."

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"We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the Special Term, or whether it would have been proper for the Special Term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the General Term to do so; but we render our decision solely upon the point that, as neither the

Special Term nor the General Term allowed interest on the judgment, and as this Court awarded no interest in its judgment of affirmance, all that the General Term could do, after the mandate of this Court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the General Term, and directing execution of the judgment of the Special Term of December 18, 1885, with costs, and without interest, and of the judgment of the General Term of June 28, 1886, for costs."

This decision and language of the Court is especially pertinent in the present case. It is not now a question in this case whether the original judgment of the Circuit Court *could* have been against The Texas and Pacific Railway Company, or whether the judgment of affirmance of this Court *should* have directed judgment and execution against that company (though, obviously, neither of these things could or should have been done), but the question is, what judgment *was* rendered, and whether a judgment which was rendered against Receivers payable in the course of administration of their receivership, and which was affirmed by this Court precisely as it was rendered, can, after the mandate of this Court has gone down, be changed by the Circuit Court and execution be issued thereon against the Texas and Pacific Railway Company. Inasmuch as the judgment of the Circuit Court was against the Receiver, and that judgment was affirmed by this Court precisely as it was originally rendered, and neither that judgment nor the mandate of this Court gave any judgment against the railway company (except for costs in the Supreme Court of the writ of error), therefore, it follows, under the well-settled rules above stated, that there is no judgment against the Texas and Pacific Railway Company (except for costs of writ of error in this Court), and the Circuit

Court erred in granting execution against that company on the judgment against the Receivers.

III.

The Rate of Interest upon the Judgment.

The judgment of the Circuit Court provided for 8 per cent. interest. That was the rate in force in the State of Texas at the time the judgment was rendered (September 15th, 1888). April 13th, 1891, the statute of the State of Texas fixed the rate of interest on judgments that might *thereafter* be rendered at 6 per cent. The third question, as certified by the Circuit Court of Appeals, is whether the judgment in this case bears interest at the rate of 8 per cent., or at the rate of 6 per cent. We maintain that the judgment originally rendered in this case, to wit, the judgment of September 15th, 1888, as affirmed by this Court, is the only rightful judgment in this case. Inasmuch as that was rendered at a date when the Texas rate of interest was 8 per cent., and inasmuch as the Act of April 13th, 1891, on its face purported to make the rate 6 per cent. only on judgments *thereafter* rendered, and inasmuch as this Court affirmed the judgment with the rate of interest according to the statute of the State of Texas, the judgment must bear 8 per cent. interest. This we freely concede. Our proposition throughout is, briefly stated, that the original judgment of September 15th, 1888, was affirmed by the Supreme Court precisely as it was rendered; that it was a judgment against the Receivers only and to be paid in the due course of administration

of the receivership, and was not at all a judgment against the railway company; and hence that the Circuit Court erred in awarding execution against the railway company.

IV.

For the reasons here stated, the questions certified by the Circuit Court of Appeals should, it is submitted, be answered substantially as follows:

First. That the Circuit Court of Appeals has jurisdiction on this writ of error.

Second. That the judgment of the Circuit Court was against the Receivers only, and was to be paid in due course of the administration of the receivership, and that neither the judgment nor mandate of this Court provided that execution should issue against the Texas and Pacific Railway Company, except only for costs of the writ of error in the Supreme Court.

Third. That the rate of interest is eight per cent.

JOHN F. DILLON,
WINSLOW S. PIERCE,
HARRY HUBBARD,
For the Plaintiff in Error.

1892
149 US 237

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Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY

vs.

IDA MAY ANDERSON AND HUSBAND, SCOTT ANDERSON.

Brief of W. Hallett Phillips for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY

vs.

IDA MAY ANDERSON AND HUSBAND, SCOTT ANDERSON.

Brief of W. Hallett Phillips for Defendants in Error.

The case comes here on questions certified by the circuit court of appeals for the fifth circuit as to whether the circuit court for the eastern district of Texas properly executed the mandate of this Court directed to it in the case of Texas and Pacific Railway Company *vs.* Ida May Cox, decided at the last term.

There is another question presented concerning the jurisdiction of the circuit court of appeals to review the action of the circuit court in ordering execution against the defendant company under the mandate. As the first question involves whatever merits the matter has, and as it is competent for this Court, even if the court of appeals had no jurisdiction, to now determine whether its mandate was properly performed, we ask the consideration of this point.

The judgment in the case was recovered by Mrs. Cox for damages resulting from the death of her husband through

the negligence of the then receivers of the Texas and Pacific Railway Company.

Brown, the surviving receiver, prosecuted a writ of error to this Court to review the judgment. Before the case came on for hearing here Brown died. Previous to his death he had been discharged as receiver and the road had been restored to the company. Thereupon the defendant in error filed a motion here to have the railroad company substituted in the place of the receiver on the ground that, by reason of the restoration of the road, the company was "now the real party in interest to prosecute the writ of error and is liable should the judgment be affirmed. * * * Defendant in error therefore prays the Court to make an order substituting the said Texas and Pacific Railway Company as plaintiff in error in the place of J. C. Brown, receiver."

Notice of this motion was duly served on counsel for the Texas and Pacific Railway Company, who were also counsel for the receiver.

There was filed with the motion certified copies of the petition of the receiver for his discharge and the order of the circuit court thereon. By this order the railroad company was restored to the possession of the property, with liability for judgments recovered against the receiver.

The counsel for the company consented to the motion, provided that it should not affect the controversies presented by the record, but that they should stand for the decision of this Court the same as if such substitution had not been made. To this the counsel for defendant in error agreed. On the 4th of November, 1889, the counsel for defendant in error submitted the motion to make the Texas and Pacific Railway Company the party plaintiff in error; "whereupon

it is now here ordered by the Court that the said Texas and Pacific Railway Company be, and is hereby, made the party plaintiff in error in this cause."

The cause coming on for argument was fully discussed by counsel for the company and for the defendant in error. The opinion of the Court affirming the judgment was delivered by the chief justice, and is reported under the name of the Texas and Pacific Railway Company *vs.* Cox (145 U. S., 601). The decision considers all the questions and controversies presented by the record, and finally decides them in favor of the defendant in error.

On the 19th day of May, 1892, the mandate of this Court was issued, directed to the circuit court of the United States for the eastern district of Texas. This recites the judgment of the court below against the receiver, the writ of error prosecuted by him, and proceeds:

"And whereas, at the October term, A. D. 1889, of said Supreme Court, the discharge of John C. Brown as receiver of the Texas and Pacific Railway Company, and also his death, having been suggested, it was ordered that the Texas and Pacific Railway Company be made the party plaintiff in error in this cause;

"And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas, and that the said plaintiff recover against the said The Texas and Pacific Railway Company for her costs herein expended and have execution therefor. May 16, 1892. You, therefore, are hereby commanded that such execution and

proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

Endorsed: Supreme Court of the United States. No. 327. October term, 1891. The Texas and Pacific Railway Company *vs.* Ida May Cox.

The mandate was duly filed in the circuit court for the eastern district of Texas, and was presented to Judge Bryant, holding said court, for action thereon. The plaintiff, Ida May Cox, having intermarried with Scott Anderson since the judgment, they filed a motion that execution should issue in their names against the defendant company. This motion was granted by Judge Bryant, and he ordered execution for the amount of the judgment, with interest at the rate of eight per cent. (8%), that being the rate of interest provided for in the original judgment.

The company claimed that it was not liable to pay the judgment, and that execution against it was not directed by the mandate, and filed a bill to enjoin such execution. This bill was dismissed, and thereupon the company applied to Judge McCormick for a writ of error from the circuit court of appeals to review the order of Judge Bryant awarding execution. This writ of error was allowed by Judge McCormick to operate as a supersedeas and the case was taken to the circuit court of appeals.

There the defendants in error made a motion to dismiss the writ of error on the ground that such a writ would not lie, and also on the ground that if a review could be had it could only be by this Court. The court of appeals took no action on this motion, but certified, on application of counsel for the company, certain questions here as to whether they

had jurisdiction, and whether the circuit court was correct in awarding execution against the company under the mandate.

The preceding facts appear from the statement of the circuit court of appeals accompanying the questions certified, and also from the transcript of this Court on the motion for substitution and its mandate, set out in full as an appendix to this brief.

We take it for granted that the statement made by the lower court, sent up with the questions and involving the interpretation of a mandate, does not prevent this Court from inspecting its own records in the matter.

From the statement we have made there would appear to be but little to argue.

As we understand, the resistance of the company to the execution awarded by the circuit court is supposed to derive its force from the particular wording of the stipulation, which was consented to by counsel for the defendant in error.

We have not been able to perceive how such stipulation affects a question which must be determined by the fact whether or not the mandate directs execution against the company. If it does, that is an end of the matter. If it does not, then we cannot contend that the circuit court had power to award execution.

That the mandate does carry with it execution is beyond successful denial, unless, indeed, we come to the conclusion that the court did not mean what it said. The mandate directly awards execution here against the company for costs. It could not award such execution for the amount of the judgment. That duty devolves upon the lower court,

and accordingly the mandate, following the invariable form of all mandates in which money judgments are affirmed, directs the circuit court that such execution be had in said cause, the said writ of error notwithstanding.

The fanciful distinction is attempted to be drawn between the liability of the company under the mandate for costs and its liability to pay the principal judgment.

Such a distinction is not drawn by the mandate itself. The same ground which would exempt the company from execution for the principal sum would also exempt it from execution for costs. Execution for costs was awarded by this Court because such execution fell within its power; execution for the amount of the judgment was directed to be issued by the circuit court because that fell within the duty of the lower court.

The mandate recites the substitution of the company as the plaintiff in error in the place of the receiver, and it is on the ground of such substitution that the company became liable.

If there was ground for doubt or room for interpretation of the mandate the whole justice and reason of the matter would show that this Court must have intended that its judgment should be final, and that the company was bound by it.

The position of the company now is that it is not liable to pay the judgment, although in form the contention is directed against its liability to execution.

Execution is but carrying into effect the judgment, and therefore the inquiry is whether by becoming the party plaintiff in error the company bound itself to abide by the judgment.

Why was the company substituted unless it was to make it liable in the place of the party against whom the judgment was originally rendered, if that judgment should be affirmed?

As a general thing this Court does not recognize formal parties, and when parties are substituted here they are presumed to make themselves in all respects as liable as the parties in whose places they stand. The argument now made is that the judgment was originally against the receiver to be paid out of the receivership, and the company did not make itself liable by being substituted as plaintiff in error in the place of the receiver; but this argument overlooks the fact that by the discharge of the receiver and the restoration of the property to the company the state of things existing at the time of the original judgment had become changed. New rights had been acquired by the company and new responsibilities assumed.

Suppose at the time the writ of error was sued out the receiver had been discharged and the company had prosecuted (as would have been proper) the writ of error. Would it not have been liable to pay the judgment if it had been affirmed?

What difference can it make as to liability whether the company was plaintiff in error *originally* or became so afterwards by *substitution*.

It is said that under the mandate the judgment was simply affirmed; that such judgment was against the receiver; that we must resort to the receivership cause and subject the judgment for review to the equitable powers of the Court appointing the receiver. This contention can

only be correct if we lay aside altogether the effect of the substitution made by this Court.

To say that the judgment was not made final by the decision of this Court, and that it is again to be submitted to the review of a lower tribunal, seems to us to be a mere contentious assertion. Every controversy which was suggested by the record was argued with much labor and ability by counsel on behalf of the company, and when this Court so carefully reviewed and decided each and every one of them its object was to end the litigation.

To declare now that after the road had been restored to the company, after it had become the party plaintiff in error to review the judgment entered against the receiver, and after all its defenses had been rejected that it is not liable is to make the action of this Court illusory and fruitless. It would be to declare that the Court had substituted as the only plaintiff in error in the cause a party who had no interest in the case; for if the argument of the company now made is correct the company was not a proper party to be made plaintiff in error.

It could not be a proper party because it was not the party liable on the judgment.

There is another way of looking at the matter.

At the instance of the company, as the substituted plaintiff in error, the judgment might have been reversed in favor of the company. Could not the company have set up such reversal as a bar to any liability on the judgment which the plaintiff could have attempted to enforce against

it? If this is true, why is not the judgment in favor of the plaintiff effective as concluding the company?

But say the plaintiffs in error, under the stipulation signed by the counsel for the respective parties, execution could not issue against the company.

In the execution of a mandate resort can only be had to the mandate itself. It affords its own construction. The circuit court has no discretion in the premises. It can only obey the mandate sent down. It has no right to inquire into anything except the mandate, and it is the duty of the subordinate court to carry it into execution as it is worded. The stipulation does not enter into the mandate nor was it the ground of the action of this Court in directing substitution. That action was taken on the motion of the defendant in error and on all the papers therewith filed, and the company was the only proper party to be made.

But there is nothing in the language of the consent which was given in anywise affecting the relations of the parties to the record. The language of the stipulation is fit and proper, it was willingly adopted by the counsel for defendant, and was simply that nothing in the substitution should affect the questions presented to this Court for argument by the record.

All that was meant or said is that the company should have the same right to present the questions for review as if the receiver had remained the plaintiff in error.

The argument of the company comes to this: that where a substitution is made in a case in which a money judgment has been recovered against a deceased party or against one whose interest in the matter subsequently ceased, no execution can issue against the party who is substituted

when the judgment here is affirmed; nor is he bound by the judgment; so that the whole object of substitution becomes frustrated.

When this Court in its mandate directed the circuit court to issue execution, this, of course, refers to execution against the company, the only party defendant in the case.

It cannot be said that some significance can be given to the substitution, as it was effectual for the purpose of enabling the case to proceed to final determination.

The plaintiff had already obtained a final determination of its claim in the court below, and had no new party been made here the writ of error would have been dismissed.

The effect of the substitution was to enable the company to stand in the place of the discharged receiver, and had the judgment been reversed in favor of the company the latter would have been entitled to execution for costs in this suit directly against the plaintiff.

If it were found that any discrepancy existed between the terms of the stipulation and the order of this Court made on the motion for substitution included in the mandate, such order must obtain, it being the deliberative action of the Court; but we repeat we are satisfied the Court will not find any conflict between the mandate and the stipulation and that the stipulation in nowise limited the liability of the company in case of affirmance as the substituted party.

Of course, generally speaking, judgments against receivers are payable out of receivership funds, and it is also true that such was the mode originally provided for paying the judgment recovered in this case; but the substitution

of the company, founded on the action of the court which had appointed the receiver and discharged him, turning over the property to the company with liability for the receiver's obligations, when coupled with the substitution here, made the company directly liable to discharge the judgment.

If the plaintiff in error is right the mandate must be construed in effect as if there had been a reversal and "further proceedings to be had in conformity with the opinion." This is the form when something further remains for the court below to perform than to issue execution. It is said that such further proceedings must here be taken and that plaintiffs must resort to the old receivership proceedings pending in the Louisiana court and must there present the judgment which has been affirmed as a claim in such proceedings against the receiver.

If the defendants in error should be obliged to take this course they would be met in the Louisiana court by the point that, as the company had been substituted in the case here as the party defendant, the liability of the receiver had thereby become discharged and that the case was not against the receiver. They would probably also be answered that the judgment had not been presented in the receivership cause within the time limited by the order of the court for presenting claims against the receiver, notwithstanding that all action under the judgment recovered in the circuit court was stayed by the writ of error and supersedeas sued out by the receiver.

But substitution here made did away with the necessity of any resort to such cause.

Do counsel for the company suppose that if the plaintiff

in error had limited its consent, or it so worded it that no substitution should be had here unless the company was exempted from liability or execution, such limitation would have been accepted by opposing counsel or by the court?

The company is the only party defendant in a cause in which there is a money judgment, and yet it is contended that the court could not enforce the judgment against the company.

We submit that the circuit court could do nothing else than issue execution against the company.

The motion to dismiss should have been granted by the circuit court of appeals.

First. The process which was issued was really the process of the Supreme Court and the new judgment formerly entered when the mandate was filed was in legal effect the judgment of the Supreme Court. The order sought to be reviewed was in furtherance of its express directions and was a part of its judgment.

Humphrey *vs.* Baker, 103 U. S., 737.

The ordinary principles which obtain between courts prescribe that if any complaint is made of the abuse of process resort can only be had for redress to the tribunal from which such process emanated or by which it is controlled.

By repeated decisions the rule has been established by the Supreme Court that it reserves to itself all questions arising out of the execution of its mandates or other process, and that parties must look to the remedies it affords for the correction of any alleged errors growing out of such execution. It is for that Court alone to decide whether the process con-

forms to its mandate or whether the judgment entered under it is in any respect incorrect.

Second. In order that a litigation should not be endless the rule has been announced that a second writ of error will not lie to review an order passed by the circuit court in accordance with a mandate of the Supreme Court affirming a judgment on a previous writ of error.

The judgment of the circuit court entered under the mandate is, as we have already seen, in effect, the judgment of the Supreme Court, and the second writ of error would be "from ourselves to ourselves."

The denial of a writ of error in such a matter is not intended to interfere with any remedy the parties may have by mandamus.

Stewart *vs.* Salamon, 97 U. S., 361.

Nor does it conflict with the rule that second writs of error are allowed to bring up proceedings subsequent to the mandate AND NOT SETTLED BY THE TERMS OF THE MANDATE ITSELF. But, as a matter of course, such second writ of error would only bring the case to the Supreme Court and would not lie to remove the matter to a different and independent tribunal.

Hinckley *vs.* Morton, 103 U. S., 764.
Kingsbury *vs.* Buckner, 134 U. S., 671.
Southard *vs.* Russell, 16 How., 547.

When the proceedings brought up by the writ of error are merely such as are necessary to the execution of the mandate and are commanded by it, the writ of error will be dismissed.

That court should have declined jurisdiction, as the mandate was not sent to it to be executed, nor was the judgment affirmed its judgment. We repeat, that if the matter is one reviewable at all the court which gave the directions is the only one which can be invoked to pass upon them.

A point was made below, ~~but was not~~ and certified here, as to rate of interest. The circuit court allowed eight per cent., the rate of interest specified in the original judgment and the legal rate at that time. Since it was rendered the Texas statute of April 3, 1891 (art. 2930) provides that all judgments "hereafter obtained" shall bear interest at the rate of six per cent.

It is clear that the circuit court was correct in giving the interest provided by the judgment.

W. HALLETT PHILLIPS,
For Defendants in Error.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

JOHN C. BROWN, *Receiver, etc.*,
vs.
IDA MAY COX. } No. 1091.

Motion for Substitution.

Now comes the defendant in error, by her counsel, and suggests to the Court that, in September, 1888, she recovered a judgment in the circuit court for the eastern district of Texas against John C. Brown and L. A. Sheldon, receivers of the Texas & Pacific Railway Co., for the death of her husband, caused from injuries received while employed on the railroad. That on representations of the said Brown, to the effect that Sheldon had been finally discharged as receiver before trial, a writ of error was allowed alone to the said Brown, receiver as aforesaid, and the case was docketed here February 15, 1889, in the name of *John C. Brown, receiver, etc.*, vs. *Ida May Cox.* She further shows that, on October 26, 1888, the circuit court for the eastern district of Louisiana, the same court which had appointed the receiver, made a decree discharging Brown as receiver and ordering him to deliver all the property and funds in his hands, as such receiver, to said railway company, and charging the railway company for all liability for which he, as receiver, might be held liable, as more fully appears from copy of the petition of the receiver and decree of the court herewith filed. Such delivery was made as ordered and the Texas & Pacific Railway Co. is now the real party in interest to prosecute the writ of error, and is liable should the judgment be affirmed. Since the order discharging him as receiver was made, and delivery of the property mentioned effected, the said Brown has departed this life. As appears from the record the writ of error was sued out by Brown at a date prior to his discharge as receiver.

Defendant in error therefore prays the Court to make an order substituting the said Texas and Pacific Railway Company, as plaintiff in error, in the place of J. C. Brown, receiver, in the above entitled cause.

W. HALLETT PHILLIPS,
For Defendant in Error.

To Messrs. J. F. Dillon, Wager Swayne, counsel for plaintiff in error and counsel for the Texas & Pacific Railway Co.:

Take notice that the above motion will be submitted to the Court November —, 1889.

W. HALLETT PHILLIPS,
For Defendant in Error.

(*Copy of Petition of J. C. Brown, Receiver.*)

IN THE UNITED STATES CIRCUIT COURT.

THE MISSOURI PACIFIC RAILWAY COMPANY *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY.	North. Dist. of Tex., at Dallas.

GEORGE D. KRUMBHAAR & SAM'L M. FELTON, *Trustees, etc.*, *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY.	Northern District of Texas, at Dallas.

To the honorable, the judges of the said circuit court:

Your petitioner, John C. Brown, as receiver of the Texas & Pacific railway and its property, in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties and evidence of that fact filed as part of the record.

That on it being so made to appear the court ordered him to render his accounts as receiver up to first of June, which has been done and it has been examined and approved; and since that date petitioner has kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time, if said order was not vacated, the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company; and that he be allowed to account to said company according to his account filed up to the first of June and for all receipts and expenditures by him received and made since the first of June.

He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railway company and after his discharge will be in possession of all said company's road property and funds as such for said company; wherefore, he asks that he be discharged from his said receivership and that his bond as receiver be vacated and annulled on payment of all costs legally taxable; but he prays the court to make such order as will charge the property so turned over, in the hands of said railway com-

pany and its assigns, with all liability for which he as receiver is or might be held personally liable.

Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him, and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

(Signed) JNO. C. BROWN.

Order.

On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas & Pacific railway in the above-entitled causes, be, and he is hereby, directed to make delivery unto said Texas & Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888.

Such delivery was made as of October 31, 1888.

It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and canceled.

It is further ordered that said property, nevertheless, shall be delivered to and received by said Texas & Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determinations on interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the

same extent they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property.

The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purposes as may seem needful. It is ordered that all claims against the receiver, as such, up to said 31st October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date that the same be barred, and shall not be a charge on the property of said company.

It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge, and a notice to said claimants to make claim within the time aforesaid, to wit, before the 1st of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway.

(Signed) DON A. PARDEE,
Circuit Judge.

NEW ORLEANS, *Oct.* 26, 1888.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 15th day of December, 1888.

[SEAL.] E. R. HUNT, *Clerk.*

UNITED STATES SUPREME COURT.

JOHN C. BROWN, *Receiver*,
vs.
IDA MAY COX. } No. 327.

Whereas the above-entitled action was instituted against the above-named plaintiff in error as receiver of the Texas & Pacific Railway Company;

And whereas, pending the writ of error herein, the said John C. Brown has been discharged by the United States

circuit court for the eastern district of Louisiana as receiver of the Texas & Pacific railway, and said railway company has been restored to possession of its property:

It is now stipulated that the said Texas & Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause now pending undetermined upon writ of error in this Court; such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this Court the same as if such substitution had not been made.

Dated October 31, 1889.

JOHN F. DILLON,
WAGER SWAYNE,
Counsel for Plaintiff in Error.
W. HALLETT PHILLIPS,
Counsel for Defendant in Error.

(Endorsed:) Case No. 13,491. Supreme Court United States, 1891. October term. Term No., 327. John C. Brown, receiver of the Texas & Pacific Railway, plaintiff in error, *vs.* Ida May Cox. Suggestion of removal and death of John C. Brown, receiver, and motion and stipulation that Texas & Pacific Railway Company be substituted as plaintiff in error. Office Supreme Court United States. Filed Nov. 1, 1889. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1889.

JOHN C. BROWN, *Receiver of the Texas & Pacific Railway Company, Plaintiff in Error,*
vs.
IDA MAY COX. } No. 1091.

Mr. W. Hallett Phillips, of counsel for the defendant in error, suggested the discharge of John C. Brown as receiver of the Texas & Pacific Railway Company, and also his death, and moved the Court to make the Texas & Pacific Railway Company the party plaintiff in error herein; whereupon it is now here ordered by the Court that the said The Texas & Pacific Railway Company be, and it is hereby, made the party plaintiff in error in this cause.

NOVEMBER 4, 1889.

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing printed and manuscript pages, numbered from one to thirteen, inclusive, contain a true copy of the suggestion of removal and death of John C. Brown, receiver, and motion and stipulation that Texas & Pacific Railway Company be substituted as plaintiff in error and order thereon in the case of John C. Brown, receiver, &c., plaintiff in error, *vs.* Ida May Cox, No. 327, October term, 1891, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 28th day of March, A. D. 1893.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

MANDATE.

UNITED STATES OF AMERICA, *ss:*

(L. S.)

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Whereas lately in the circuit court of the United States for the eastern district of Texas, before you or some of you, in a cause between Ida May Cox, plaintiff, and John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific Railway Company, defendants, wherein the judgment of the said circuit court, entered in said cause on the 15th day of September, A. D. 1888, is in the following words, viz:

"Whereas on the thirteenth day of September, A. D. 1888, this cause came on to be heard and all parties announced ready for trial, and the jury was empaneled and sworn according to law to try the issues herein, and on the days thereafter the evidence and part of the argument was sub-

mitted, and on this day all of the arguments being concluded and the jury received the charge of the court, the said jury retired from the bar of the court to consider of their verdict, afterwards, on this same day, returned into open court their verdict in words and figures as follows, to wit:

"'JEFFERSON, TEXAS, *September* 15, 1888.

"'We, the jury, find for the plaintiff and assess the damage at $15,000.00 (fifteen thousand dollars).

"'J. H. MCCLIMMONS, *Foreman.*'

"Therefore it is considered by the court, ordered, and adjudged that the plaintiff, Mrs. Ida May Cox, do have and recover of and from the defendants John C. Brown and Lionel A. Sheldon, receivers, as receivers of the Texas and Pacific Railway Company, the sum of fifteen thousand dollars, with interest thereon at the rate of 8 per cent. per annum from this day, and all costs in this behalf expended, to be paid in due course of their administration of their receivership.

"Further ordered that the officers of this court do have and recover from the parties herein their costs by them respectively incurred.

"And it is ordered that a certified copy of this decree be forwarded by the clerk of this court to the clerk of the United States circuit — of the eastern district of Louisiana, to be filed by him in the papers of said receivership and called to the attention of the court."

And afterwards, to wit, on the 12th day of October, A. D. 1888, the following entry appears of record, viz:

"In this cause, in which the motion for a new trial was argued and submitted on October 11th, 1888, the court having expressed the opinion that the verdict was excessive, and that it was willing to let the same stand for ten thousand dollars in case the plaintiff should see fit to remit the sum of five thousand dollars on the amount found by the jury, thereupon this the 12th day of October, 1888, came the plaintiff and filed her remittitur thereon in said sum of five thousand dollars, and thereupon the motion for a new trial herein was overruled by the court, and such heretofore rendered is permitted and adjudged to be and remain in

full force and effect, subject, nevertheless, to the said remittitur of five thousand dollars as of the date of the judgment herein; and it is further ordered that a certified copy of this order to be certified with the judgment rendered herein in like manner as is directed in the said judgment as to itself, and that both be embraced in the same certificate.

"Defendants excepted to the ruling of the court in overruling the motion for a new trial.

"CHAUNCEY B. SABIN,
"*U. S. District Judge for the Eastern District of Texas.*"

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error sued out by John C. Brown, receiver of the Texas and Pacific railway, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas at the October term, A. D. 1889, of said Supreme Court, the discharge of John C. Brown as receiver of the Texas and Pacific Railway Company, and also his death, having been suggested, it was ordered that the Texas and Pacific Railway Company be made the party plaintiff in error in this cause;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas, and that the said plaintiff recover against the said The Texas and Pacific Railway Company — for her costs herein expended, and have execution therefor. May 16, 1892.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice